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In The

Supreme Court of the United States

BOSS CAPITAL, INC.,

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit Court of Appeals improperly considered and determined a claim over which it had no jurisdiction.

II. Whether a provision allowing immediate access to the Court following a local government's denial of a permit satisfied the requirement of prompt judicial review.

PARTIES

The Petitioner is Boss Capital, Inc., a Florida corporation, the plaintiff in the still-pending District Court suit and the appellant in the Court of Appeals. Boss Capital has no parent corporation or subsidiaries.

The Respondent is the City of Casselberry, a Florida municipal corporation, the defendant in the District Court and the Appellee in the Circuit Court.

All the parties to the proceedings below are parties to this Petition.

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BASIS OF JURISDICTION

Petitioner Boss Capital alleges that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The 11th Circuit Court of Appeals entered its opinion at issue on September 3, 1999. Boss Capital's Petition for Rehearing was denied by 11th Circuit Order of October 18, 1999.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondent City of Casselberry, Florida accepts the reference to pertinent constitutional provisions and statutes involved in this Petition. Any reference herein to the Petition for Writ of Certiorari shall be made by (PC-page # ___). Any reference to the opinions and Orders of the 11th Circuit Court of Appeals and the U.S. District Court for the Middle District of Florida relevant here, as attached in the Appendix to the Petition for Writ of Certiorari shall be made by (PCA- page # ___).

STATEMENT OF THE CASE

Respondent *generally* accepts the factual references in Petitioner's Statement of the Case. Respondent specifically objects, however, to argumentative allegations in Petitioners' Statement of the Case, including bald allegations for which there is no record citation whatsoever. (PC-4, fn. 1, 2).

Respondent will reserve for the argument portion of this Brief any response to those allegations, or reference

to relevant facts not cited in Petitioner's Statement of the Case.

ARGUMENT

I. Whether the Eleventh Circuit Court of Appeals improperly considered and determined a claim over which it had no jurisdiction.

Petitioner Boss Capital has no right to contest the 11th Circuit's affirmance of the District Court's entry of Summary Judgment for the City of Casselberry on Petitioner's attack on the constitutionality of the City's licensing provisions for adult entertainment businesses. The City's denial of Petitioner's application for an adult entertainment license resulted in Petitioner filing a lawsuit against the City in the Middle District of Florida. (PC-3). In that suit, Petitioner Boss Capital specifically challenged both the zoning *and* licensing regulations of the City, claiming they violated the First Amendment's guarantee of the right to free expression. (PCA-4a). Petitioner challenged the City's licensing provisions on the basis they failed to provide the procedural safeguards mandated by this Honorable Court in *Freedman v. Maryland*, 380 U.S. 51 (1965), et al. (PC-3).

In entering Summary Judgment for the City, the District Court upheld both the zoning *and* licensing ordinances for adult entertainment business in the City. (PCA-20A-47A). The District Court specifically found that the provision of the City ordinance allowing an unsuccessful applicant to immediately file suit and seek emergency relief in Court to challenge the application denial

complied with *Freedman* and its progeny. (PCA at 35A-36A).

Petitioner Boss Capital then appealed to the 11th Circuit. In its lengthy and learned opinion, that Court carefully recounted the undisputed facts below and the case authorities in this area starting with *Freedman, supra.* (PCA-1A-18A). After remanding to the District Court the limited zoning issue of the number of sites available inside the City limits for adult businesses, the 11th Circuit then analyzed the City's licensing ordinances. (PCA-7A-17A). After carefully fitting the City of Casselberry licensing ordinance into the series of opinions post-*Freedman,* the Court ultimately concluded that the City's licensing ordinance at issue does *not* give City officials too much unbridled discretion in deciding whether to issue licenses *and* that the Ordinance provided for prompt judicial review in compliance with *Freedman, supra.* (PCA-7A-14A).

For Petitioner Boss Capital to contend before this Honorable Court now on its *certiorari petition* that the 11th Circuit **"improperly"** considered and ruled upon Petitioner's own appeal of the District Court's denial of its attack on the City's licensing ordinance defies logic and fairness. It was *Boss Capital* that attacked the constitutionality of the City's licensing ordinances with the lawsuit filed in District Court. It was *Boss Capital* that appealed the District Court's decision that the City's licensing ordinances passed constitutional muster. It was *Boss Capital* that appealed that District Court finding to the 11th Circuit. Finally now, because it lost that argument at the District Court *and* Circuit Court level, it is *Boss Capital* that has the gall to assert that the 11th Circuit

should never have considered and ruled upon the very appeal that *Boss Capital* brought to that Court.

Nothing in the brief argument in Boss Capital's Petition on this point demonstrates to the contrary, or supports its bald allegation that the 11th Circuit should have never considered Boss Capital's own appeal on the constitutionality of the City's licensing ordinance. There is no dispositive legal and factually on-point support cited for Boss Capital's attempt to rely upon the **"basic constitutional rule of standing,"** as applied to the facts here. (PC-5). That rule generally applies at the *outset* of a suit, when a Court may find that a party which filed a suit attacking a statute or ordinance has no standing because that party cannot obtain any relief. But Boss Capital still *seeks* relief through its own lawsuit and appeal, which attack both the zoning *and* licensing ordinances.

Simply because the 11th Circuit remanded a portion of the case to the District Court for a final determination of facts relevant to the *zoning* issue does not make the Circuit Court's learned opinion on the appeal brought by Boss Capital on the *licensing* issue moot. In fact, once the case returns to the 11th Circuit after expedited determination of the factual inquiry by the District Court, a final decision will be made on both the zoning *and* licensing appeals brought by Boss Capital against the City. If the Summary Judgment on the City's zoning regulations is *reversed*, Boss Capital's claim for relief lives on.

In this undisputed context, Boss Capital is simply making a last gasp attempt in its Petition to this Honorable Court for reversal of the otherwise solid and

unassailable affirmance by the 11th Circuit of the District Court's well-reasoned entry of Summary Judgment in favor of the City on Boss Capital's attack against its licensing ordinance. Obviously, Boss Capital has no other grounds to seek this Court's *certiorari* jurisdiction for its defeat at the 11th Circuit besides the effort it makes in the argument to Point II in this Petition. (See below). But its argument on standing – " . . . **that since the panel had not struck the zoning provisions, it should not have reached the issue of the constitutionality of the licensing sections . . .** " (PC-9) – ignores the obvious fact that it was Boss Capital *itself* that filed suit against the City attacking the constitutionality of the licensing provisions *and* filed the appeal with the 11th Circuit on that very issue when it lost below. This new issue of standing was then not raised until Boss Capital's Petition for Rehearing was filed in the 11th Circuit, and it was properly denied without opinion after the Circuit Court considered it. (PCA-19A).

No Court has found that a disgruntled license-seeker who sues a governmental body as a result of its application denial then appeals to a Circuit Court its loss at the trial court level has suddenly lost its standing in mid-appeal. Nor is there any support for Boss Capital's bald allegation in its Petition that the 11th Circuit's opinion herein declares that, " . . . **any party can challenge a licensing ordinance whether or not that party can ever obtain a license, and whether or not a successful challenge could ever benefit anyone!**" (PC-7).

It is no wonder Petitioner did not cite to the 11th Circuit's opinion in making that bald remark, since that statement or even implication cannot be found anywhere

in the opinion. More importantly, Petitioner Boss Capital had standing from the outset of its lawsuit to challenge the licensing ordinance as it did, because of its claim that its application was denied on *allegedly* unconstitutional grounds. (PC-4). It still has that standing, and this case is still being litigated at the District Court.

Nothing in this Honorable Court's opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) supports Petitioner's argument on the standing issue here. Though this Court's opinion there did involve the jurisdictional issue of standing, its holding on that issue has nothing to do with the facts here. As Petitioner Boss Capital concedes in its Petition, in that case,

> **" . . . the Court stated very clearly that when it does not appear affirmatively on the record that some party has an interest in the outcome of a challenge to a particular claim, the federal courts cannot entertain that challenged." (PC-8).**

Here, quite obviously, Boss Capital has an interest in the outcome of its challenge to the constitutionality of the City of Casselberry's licensing ordinance provisions. There, this Court noted that the attack on the two Dallas ordinance provisions at issue:

1. That a person was not eligible to receive a license if he or she were living with another person who had a license denied or revoked, and

2. That a person who had been convicted of certain crimes or offenses was disqualified. (PC-8)

resulted in the conclusion that there was no party before the Court who was living with an individual whose

license application was denied or license revoked, and no party subject to disqualification because of prior conviction. *FW/PBS*, 493 U.S. at 233-34. Thus the lack of standing was clear on the record.

But here Boss Capital continues to be a plaintiff with standing to attack the constitutionality of the City of Casselberry's licensing *and* zoning ordinances related to adult businesses. It has never lost that standing, since its application denial is still on the record and its attack on the City's zoning regulations continues to be litigated on remand to the District Court. (PCA-14A).

Perhaps most importantly, Boss Capital has failed to alert this Honorable Court either in its Statement of Facts or Argument on this issue to the ultimate conclusion of the 11th Circuit relevant hereto:

> **"Boss Capital also contends that Casselberry's adult entertainment licensing ordinance is invalid because it gives licensing officials too much discretion in violation of *Shuttlesworth*. Whatever the merits of this argument, we conclude that Boss Capital has not preserved this issue for appeal. Boss Capital's first Complaint raised the issue, but Casselberry has since repealed one of the provisions to which Boss Capital initially objected. After that, Boss Capital scarcely mentioned the issue before filing its Brief with us. The District Court did not address the issue. This is not enough to preserve an issue for appeal, so we decline to address it. *See, Resolution Trust Corp. v. Dunmar Corp.*, 43 F. 3d 587, 599 (11th Cir. 199) (*en banc*)."** (PCA-10A-11A).

In that context, this Honorable Court should hardly exercise its *certiorari* jurisdiction over this last gasp attempt to raise an issue that has no relevance to the undisputed facts below. Contrary to Petitioner's closing argument on this issue, Boss Capital continues to seek its license through the original litigation it filed in the District Court, its appeal to the 11th Circuit, and now this Court. On remand, the District Court may find other locations in the City where a party may apply for a license, or under the City's ordinance Boss Capital may seek a license to take over one of the adult entertainment businesses already in the City.

Simply put, Boss Capital fails to demonstrate why either the District Court or the Circuit Court should not have ruled on Boss Capital's own attacks on the constitutionality of the City's licensing provisions, whether or not its simultaneous attack on the constitutionality of the City's zoning restriction was won or lost. Both Boss Capital and the City were entitled to federal adjudication of these constitutional attacks. Simply because Boss Capital has lost one of the attacks and its other has been remanded for further inquiry at the District Court level hardly qualifies it as a party no longer having the requisite standing, since it quite clearly has a substantial and continued interest in the final outcome of its attacks. (See, i.e., Boss Capital's argument to Point II in its Petition).

Simply because Boss Capital's appeal has been allowed to continue demonstrates it has a sufficient stake in the continuing litigation to show its standing. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 334, 100 S. Ct. 1166, 63 L. Ed. 2d 417 (1980) (appeal may be taken by prevailing party so long as that party retains a stake).

Having proven its standing to challenge the constitutionality of the City's ordinances at both the District Court and Circuit Court levels, it is disingenuous for Boss Capital to now argue its own *lack* of standing in its own appeal here to the Supreme Court.

Throughout this litigation, Boss Capital has attacked both the zoning *and* licensing ordinances of the City of Casselberry, and continues to do so in this Petition. It should hardly be allowed now to allege its own *lack* of standing to attack the licensing provisions, because it *continues* its attack on the zoning ordinances. Boss Capital should be hoist on its own petard here, both as a matter of fairness and logic.

Nothing in the case law authorities or arguments it makes very briefly on this particular point demonstrates to the contrary. Thus the Respondent City of Casselberry respectfully submits that Boss Capital's Petition to this Honorable Court should be DENIED.

II. Whether a provision allowing immediate access to the Court following a local government's denial of a permit satisfied the requirement of prompt judicial review.

Petitioner Boss Capital, Inc. argues that the City of Casselberry's licensing provisions for adult entertainment businesses does not provide for the required **"prompt judicial review."** But the City's pertinent Ordinance specifically states:

> **"(c) JUDICIAL REVIEW. Any decision of the Community Development Department, pursuant to Division 2 (License) may be**

> ***immediately reviewed*** **as a matter of right by the Circuit Court upon the filing of an appropriate pleading by an aggrieved party." (PCA-17A).**

The District Court granted Summary Judgment for the City of Casselberry on Boss Capital's attack on that ordinance's constitutionality. (PCA-47A). The 11th Circuit Court *affirmed*, appropriately finding under our system of checks and balances that, **" . . . a general right to judicial review of an administrative decision may be enough."** (PCA-8A).

The Court noted that Casselberry's Ordinance contains the explicit judicial review provision quoted above. Thus it squarely confronted the issue now raised in this Petition, whether this Honorable Court's prior opinions, **" . . . require a guarantee of prompt judicial resolution of license denials."** (PCA-6A-7A).

The Circuit Court first noted Justice O'Connor's plurality opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), which states:

> "**There must be the possibility** of prompt judicial review in the event that (a) license is erroneously denied." *F.W./PBS* 493 U.S. 228 (Emphasis added). (PCA-7A).

In *FW/PBS*, it was emphasized that the Dallas ordinance there violated the First Amendment because it *failed* to provide, **" . . . an avenue for prompt judicial review."** *Id.* at 229 (emphasis added). But Justice Brennan's concurring opinion, while not disagreeing with the Court's plurality opinion on this issue, referred to the

right of prompt judicial review as the right to **"a prompt judicial determination."** *Id.* at 239.

This difference between Justice O'Connor's and Justice Brennan's interpretations of the right to prompt judicial review has caused a split in the Circuit Courts, which can certainly be tolerated like many others by this Honorable Court. The 11th Circuit in the *Boss Capital* opinion at issue *joined* the First, Fifth and Seventh Circuits in holding that prompt judicial review for licensing decisions mean *access* to prompt judicial review, not the right of the executive branch to mandate how quickly the judicial branch does its business. *See, Boss Capital,* (PCA-9A); *Jews for Jesus, Inc. v. Mass Bay Transp. Auth.,* 984 F. 2d 1319, 1327 (1st Cir. 1993); *TK's Video, Inc. v. Denton County,* 24 F. 3d 705, 709 (5th Cir. 1994); *Grand Brittain, Inc. v. City of Amarillo,* 27 F. 3d 1068, 1070 (5th Circ. 1994); *Graff v. City of Chicago,* 9 F. 3d 1309, 1324-25 (7th Cir. 1993) *en banc.*

In the 11th Circuit opinion at issue in this Petition, that Court ultimately concluded that this Court's opinions in *Freedman v. Maryland,* 380 U.S. 51 (1965) and *FW/PBS, supra,* may intend a requirement of prompt judicial *resolution* of *censorship* decisions, **" . . . but in the end we conclude that access to prompt judicial review is sufficient for licensing decisions."** (PCA-8A) (emphasis applied). As the Court notes, *Freedman* and its progeny involve censorship, not licensing ordinances. (PCA-9A). *Freedman,* for example, resulted from a State law which authorized public officials to ban immediately movies they found obscene. (380 U.S. at 52-53, n.2). But as the 11th Circuit properly found in arriving at an important distinction below:

> **"The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the content of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license. See, *11126 Baltimore Blvd.* 58 F. 3d 988, 1003 (4th Cir 1995) (*en banc*) (no need for a guarantee of a prompt judicial decision in the absence of a direct restraint on speech); See also, *FW/PBS*, 493 U.S. at 229, 110 S. Ct. 596 (licensing officials do not pass judgment 'on the content of any protective speech'; rather they look at 'the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.')**
>
> **"Indeed, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S. Ct. 935 (1969) limits licensing officials to the mundane and the ministerial. See, *Lady J. Lingerie*, 176 F. 3d at 1362 . . . furthermore, applicants for adult entertainment licenses, unlike movie distributors who might show a given film in hundreds of theaters around the country, have every incentive to stick it out and see litigation through to its end. Cf. *FW/PBS*, 493 U.S. at 229-30, 110 S. Ct. 596 (plurality opinion) (no need to put burden of going to court and burden of proof on licnsing officials because license applicants have the incentive to go to court). The need for a prompt judicial decision is therefore less compelling for licensing ordinances than for censorship schemes." (PCA-9A-10).**

That reasoning of the 11th Circuit is logical and compelling, and should not be disturbed here. In *FW/PBS*,

this Court set out two requirements for licensing ordinances on adult entertainment businesses such as the one at issue here. The licensing process must provide for definite time limits within which a license is to be granted or denied, and an avenue for prompt judicial review must be established. *Id.* The Casselberry Ordinance clearly satisfies both requirements. Boss Capital does not even argue any problem with the requirement for prompt decision-making on granting or denying the application for a license. Nor does Boss Capital argue any longer, as it did below, that the licensing ordinance is either overbroad or, " . . . **vests unbridled discretion in the decision-maker.**" *FW/PBS*, at 223.

But as to the issue of prompt judicial review that *is* argued by Boss Capital in its Petition, it ignores this Court's holding that it is the license *applicant* who bears the burden of proving to the Court that the denial was improper under the law and particular facts. Boss Capital failed to bear the burden here and below of proving to the Court that the City Ordinance does not provide an avenue for prompt judicial review. *See, FW/PBS*, 493 U.S. at 229-30 (explicitly declining to shift the burden of proof to the government in licensing ordinance cases).

How can an Ordinance which allows a licensing decision to, " . . . **be immediately reviewed as a matter of right** . . . ," be declared invalid for not providing an avenue for prompt judicial review? (PCA-17a). Certainly that fact distinguishes the facts here from the 6th Circuit's opinion in *East Brook Brooks, Inc. v. City of Memphis*, 48 F. 3d 220 (6th Cir. 1995), where judicial review of an adverse decision was limited solely to the filing of a Petition for the Common Law Writ of Certiorari. *Id.* Here,

the applicant can immediately file any **"appropriate pleading"** for immediate review by the Courts, including an Emergency Motion for Preliminary Injunction. (PCA-17A).

The holding in *FW/PBS* requires only that the **"possibility of prompt judicial review"** or **"an avenue for prompt judicial review"** be present. *FW/PBS* at 493 U.S. 228-29. The Second Circuit has implied that it would follow the logic and reasoning of the First, Fifth, Seventh and Eleventh Circuit Courts, in finding that **"prompt judicial review"** can only mean *access* to prompt judicial review. *See, Beal v. Stern,* 184 F. 3d 117 (2nd Cir. 1999) (noting, without deciding, that prompt access to judicial review in State Courts would satisfy the *Freedman* test).

It does not appear that this Honorable Court in *FW/PBS* intended for a prompt judicial *determination* to be *required* in a situation where a City's ordinance provides for the broadest type of judicial review within its powers. To find otherwise is to invalidate broadly-worded ordinances solely on the basis of the swiftness or slowness of that particular locale's judicial procedures. Yet this is what Petitioner Boss Capital seeks here: either a test that could force the federal circuit courts to reach arbitrary and inconsistent decisions based upon the various procedures of the different state court systems within their jurisdiction, or a requirement that cities allow adult entertainment businesses to open their doors and proceed to their business despite facially valid grounds for license denial, while the *local governments* bear the burden of seeking *approval* of their decisions from the judicial branch.

Surely that is not the result mandated by this Honorable Court in *FW/PBS*. Even if a prompt judicial *determination* is required, as argued by the Petitioner here, this Petitioner never met its burden of proving below or now that it could *not* gain such a prompt judicial determination in a Court of competent jurisdiction over the matter. In fact, Petitioner does not even allege in this case that its avenues for prompt judicial review are somehow inadequate.

Perhaps most importantly, the spirit of the *Freedman* test, that undue suppression of constitutionally protected speech must be avoided, is satisfied here. Petitioner Boss Capital may be granted an emergency preliminary injunction or temporary restraining Order under the Florida Rules of Procedure immediately after it initiates immediate judicial action. Nothing in the Petition filed by Boss Capital demonstrates to the contrary.

For these reasons, and for those more eloquently set forth in the 11th Circuit's 14-page opinion at issue, the Respondent City of Casselberry, Florida respectfully submits that this Honorable Court should not exercise its *certiorari* jurisdiction over this matter. This Court should *not* invalidate the section of the City of Casselberry's Ordinance which explicitly states that it allows for immediate judicial review as a matter of right to the unsuccessful applicant. This Court should not allow its *Freedman* or *FW/PBS* opinions to be interpreted to *mandate* that the executive branch at the local government level must force its local judicial branch to alter or accelerate its procedures beyond the avenues for emergency relief it already provides.

Accordingly, the 11th Circuit Court in the *Boss Capital* decision at issue agreed with the First, Fifth and Seventh Circuits in holding that prompt judicial review is sufficient for decisions on adult entertainment licensing applications such as the one at issue here. Thus the Respondent City of Casselberry's Ordinance, which clearly provides for immediate review **"as a matter of right by the Circuit Court"** does not run afoul of this Court's opinion in *Freedman* or *FW/PBS*. Boss Capital's Petition for the issuance of a Writ of Certiorari from this Honorable Court should be DENIED.

CONCLUSION

For all the reasons stated herein or to be gleaned from a review of the District Court's and 11th Circuit Court's opinions at issue herein, the Respondent City of Casselberry, Florida respectfully submits that Petitioner Boss Capital, Inc. has failed to carry its burden of proving that this Honorable Court's exercise of its *certiorari* jurisdiction is compelled here. Thus the Respondent City of Casselberry respectfully submits that the Petition for the Writ of Certiorari filed herein by Petitioner Boss Capital should be DENIED.

Respectfully submitted,

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